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Possible reform of Investor-State dispute settlement (ISDS)

Comments by the Government of Thailand

Note by the Secretariat

In preparation for the thirty-fifth session of the Working Group, the Government of Thailand submitted to the Secretariat comments regarding procedural concerns regarding ISDS. The English version of the comments was submitted to the Secretariat on 11 April 2018. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

Procedural Concerns Regarding Investor-State Dispute Settlement: Thailand's Perspective

[Original: English]
[Date: 11 April 2018]

1. Introduction

1. This paper aims to identify procedural concerns regarding ISDS from the perspective of a developing country, both as a recipient of foreign direct investment and as a capital exporter. It is without prejudice to Thailand's position that discussions on ISDS reform should focus not only on procedural but also substantive matters, taking into account the substantive divergences among international investment agreements (IIAs).

2. The paper first reiterates the general principles that should guide the Working Group's discussion on ISDS reform (section 2). It then identifies and explains procedural concerns regarding ISDS that warrant detailed elaboration by the Working Group (section 3). The last section (section 4) discusses the relevance of inter-institutional cooperation and capacity-building initiatives for the Working Group's discussions on ISDS reform.

2. Guiding principles for discussions

3. With the objective of promoting a reform that is legitimate, viable, sustainable, and beneficial to all, an important principle that should guide the Working Group's discussions on ISDS is inclusiveness. Both members and non-members of UNCITRAL must be able to participate fully regardless of their level of development to ensure that all concerns raised are considered in the process.

4. Discussions on ISDS reform should be holistic and balanced, taking into account the different priorities of each State including: (a) the pursuit of public policy objectives of host States; (b) the promotion of responsible investment; (c) the protection of investors' rights; and (d) the attainment of global objectives such as sustainable development and food security.

5. Discussions on ISDS reform should also be thorough and not limited to just one aspect of ISDS — that is, arbitration. Focusing discussions on arbitration as a way to resolve investment disputes could deprive the Working Group of innovative solutions to the current problems. Instead, the Working Group should allow for discussions on other aspects of ISDS, in particular alternative dispute settlement mechanisms that may be used during the pre-arbitral stage and in parallel with the arbitration.

3. Concerns regarding ISDS procedures

3.1 The large amount of time and cost required in the arbitral proceedings

3.1.1 Ineffective use of alternative dispute resolution mechanisms during the pre-arbitral phase — a missed opportunity to reduce gaps between opposing positions?

6. Developing countries in a dispute are not always familiar with alternative dispute resolution (ADR) mechanisms and their potential to be used at the pre-arbitral phase. In many IIAs, only the consultation process is expressly provided for as a means to reach a mutually acceptable solution. In other cases, the IIAs are silent on the use of ADR mechanisms altogether.

7. Pre-arbitral proceedings, including good offices, mediation and conciliation, can help claimants and host States clarify each other's positions, and reduce the gap between the parties. In this respect, such mechanisms can facilitate the resolution of disputes through constructive dialogue. The involvement of third-party facilitators at an early stage should also be encouraged and widely used to assist the disputing

parties in arriving at a mutually agreed solution, thus reducing time and cost spent for the entire process. However, if the third-party facilitators participate too late in the process, one of the parties may deem such intervention unnecessary and a possible delay tactic from the other side.

8. A discussion on a possible guideline aimed at promoting an increasing interaction between professionals involved in the pre-arbitral phase through ADR mechanisms and arbitrators engaged during the arbitral proceedings would be useful.

3.1.2 Long "battle" during the enforcement phase of awards — another hidden aspect of costly and lengthy arbitration process

9. For the non-ICSID Member States which decide not to recognize and enforce the award rendered by the arbitral tribunal, they may request annulment of such award following the rules under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Such enforcement process usually involves a large amount of time and financial resources. In some complex cases, it may take longer time than the arbitration phase itself. From the perspective of a developing country with limited resources, any ISDS reform should therefore focus on promoting clarity and efficiency at the enforcement stage.

3.2 Arbitrators and their conduct

10. Another concern in ISDS is related to arbitrators' possible pre-existing bias due to their repeated appointments on one side of the dispute, and situations of "double-hatting" where the same persons are appointed as counsel and arbitrators in similar disputes. Such situations can bring about conflicts of interests in positions, and undermine the impartiality of arbitrators.

11. In addition, leading arbitrators are usually engaged in a large number of ongoing cases, giving them insufficient time to conduct a comprehensive analysis of issues at stake.

12. Another procedural concern results from specific requirements of arbitrators, which could generate extra burdens for developing countries. Arbitrators usually have predominance over the States regarding the establishment of rules of procedure and additional procedural arrangements, which can incur unexpected costs and time.

13. Inconsistent and incoherent views of arbitrators produce inconsistent and incoherent arbitration awards. Within the context of striking a proper balance between the preservation of host State's policy space and the safeguarding of investors' rights, any future reform should aim at ensuring consistent awards by ensuring that States secure the position of "master of treaties" through, inter alia, a joint interpretation mechanism, and do not become "slave of their own treaties" through an arbitration process. In parallel, the Working Group should consider carefully the idea of adding a new layer to the current ISDS system, be it an internationally composed entity or an appellate review mechanism of awards, and avoiding unnecessary new ISDS institutions.

14. To address these concerns, a code of conduct on ethics of arbitrators could be considered, containing, inter alia, clear provisions on permissible external activities and ways of implementing the joint interpretation mechanism.

3.3 External counsel and their professionalism

15. Developing countries often lack experience in ISDS cases and do not have in-house lawyers specialized in ISDS. They consequently have to rely heavily on legal services provided by external counsel. Since well-established external counsel are also often from a limited pool and are preoccupied with many concurrent cases, it is often the case that there can only be limited resources granted to each one.

16. There are international law firms specializing in ISDS that do not have a lot of experience working with developing countries. Therefore, they are not necessarily

familiar with developing countries' procedures, mindset and methodology of work. Such a situation leads to a range of problems from the law firms not being able to present what developing countries need at the initial interview to the law firms not being able to draft the terms of the employment contract that would suit the particular requirement of the State. The most immediate concerns of developing countries regarding external counsel are the cost of the arbitral proceedings, dealing with the arbitration procedures and their lack of flexibility in certain circumstances. International law firms and administering authorities need to recognize the limited resources of developing countries.

3.4 Unpreparedness of host States in ISDS cases

17. Developing countries generally lack the expertise on ISDS arbitration issues. As a consequence, they usually find themselves unprepared when ISDS disputes arise. This problem is compounded by the fact that there is usually no internal channel of communication available, leading to an inefficient coordination among relevant national agencies. This consequently prevents developing countries from effectively administering the disputes. In addition, respondent States are regularly facing tight schedules, especially when preparing their submissions. This puts them at a disadvantage compared to the claimants that usually have much more time to prepare. This situation is exacerbated by the fact that some of the existing arbitration rules, such as the UNCITRAL Arbitration Rules 1976, do not provide the respondent State with the opportunity to challenge the schedule established by the arbitral tribunal.

18. In an ISDS case, developing countries may also face unforeseen situations, where the claimants are financed by third-party funders. Although third-party funding may facilitate access to justice and improve security for costs in the arbitral proceedings, it raises concerns regarding conflicts of interest where, for example, counsel for a funded case is also an arbitrator in another case with the same funder. This could affect the arbitrators' impartiality, endangering the legitimacy of the arbitral proceedings. An appropriate regulation of third-party funding can help minimize its unintended consequences, while maximizing its benefits such as the allocation of costs and the security for costs.

3.5 Limited access to legal service at a reasonable cost

19. At present, there is no international body, which specializes in providing independent, low-cost legal advice on ISDS to developing countries — a body similar to the Advisory Centre on WTO Law (ACWL), which provides low-cost legal services on WTO law. Many developing countries thus have to endure the relatively high cost of legal services provided by international law firms, many of which may not even have adequate experience and expertise in handling ISDS cases. Indeed, defending ISDS cases requires a huge amount of developing countries' resources, both human and financial — resources, which could have been more usefully spent on meeting their developmental needs.

20. In this light, the establishment of an independent advisory entity, which caters for developing countries' particularities and specific needs, might be useful. Such an entity might take the form of an investment dispute advisory centre, which is separate from the proposed establishment of the International Tribunal for Investment. It should be independent, internationally funded, and composed of lawyers representing geographical diversity and would specialize in providing low-cost legal advice on international investment law to developing countries. Its operation should be expeditious and generate as little transaction costs as possible.

21. Such an entity could help ensure that developing countries are able to defend themselves adequately in ISDS cases, thus enhancing the expertise-based legitimacy of ISDS system.

4. Additional suggestions

4.1 Promote coordination among relevant international organizations

22. Many developing countries, including Thailand, have engaged in discussions on ISDS in many international forums besides UNCITRAL, including UNCTAD and OECD. Yet, these discussions have thus far yielded few concrete outcomes, in part due to the lack of sufficient coordination among the relevant forums. Without coordinated efforts, these piece-meal discussions on ISDS reform may lead to fragmented, inconsistent outcomes that are counter-productive to the global efforts at reforming ISDS.

23. To ensure concerted efforts among the different organizations, UNCITRAL should coordinate more closely with other organizations, both regional and international, which are engaging in discussions on ISDS reform including, inter alia, UNCTAD, ICSID and OECD. Such enhanced coordination will not only help avoid duplication of efforts among different organizations but also enrich and contextualize the discussions of the Working Group.

4.2 Provide capacity-building assistance to promote dispute prevention

24. Developing countries often lack knowledge and/or capacity to prevent conflicts from escalating to full-fledged arbitral proceedings. This makes them, as host States, vulnerable to claims from investors. Thus, any ISDS reform should go hand in hand with the promotion of dispute prevention policy. One such policy could be the improvement of investor-State communication through strengthening institutional arrangements between investors and the respective agencies.

25. From developing countries' perspective, the provision of capacity-building assistance should be deemed as a priority for reform purposes. Such assistance may be provided by relevant international organizations or by developed countries with expertise in the investment dispute management, and may take several forms, such as the organization of workshops or training sessions for the agencies concerned. These capacity-building exercises can help States develop effective and rational investment policies, thus avoiding the proliferation of ISDS cases.